Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

TONYJA DUFFIELD,
Petitioner,

v.

ROBERTSON, STEPHENS & COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the federal government's involvement in the securities industry's mandatory employment arbitration system, by virtue of the Securities Exchange Act and the SEC's oversight role, sufficient to trigger constitutional scrutiny of that system?

2. Was the Ninth Circuit correct in refusing to address the merits of plaintiff's unconstitutional conditions challenge solely because she was hired in 1988, before the SEC promulgated a regulation requiring all securities traders to be registered with a national exchange, even though plaintiff continued to be employed after that date and despite the extensive government involvement in the securities industry arbitration scheme throughout the period of her employment?

3. Did mandatory securities industry arbitration impose an unconstitutional condition upon plaintiff's employment?

PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
1. Facts	3
2. Mandatory Securities Industry Arbitration	4
3. District Court Proceedings	6
4. Court of Appeals Decision	7
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	22

TABLE OF AUTHORITIES

CASES — Page

Barron v. Burnside, 121 U.S. 186 (1887) 12
Board of Cty. Com'rs v. Umbehr, 116 S. Ct. 2342 (1996) 11
Blount v. SEC, 61 F.3d 938 (D.C. Cir. 1995), cert. denied, 517 U.S. 1119 (1996) 8, 13, 14, 16
Blum v. Bacon, 457 U.S. 132 (1982) 9
Blum v. Yaretsky, 457 U.S. 991 (1982) 16
Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 9
Commodity Futures Trading Commission v. Schor, 478 U.S. 833 (1986) 20
Curtis v. Loether, 415 U.S. 189 (1974) 20
Duffield v. Robertson Stephens & Company, 144 F.3d 1182 (9th Cir. 1998) 1, 2
Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989) 9
Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 7, 11
Greene v. McElroy, 360 U.S. 474 (1959) 12
Herndon v. Chicago, Rock Island & Pacific Railway Co., 218 U.S. 135 (1910) 12
InterContinental Industrial, Inc. v. Amer. Stock Exchange, 452 F.2d 935 (5th Cir. 1971), cert. denied, 409 U.S. 842 (1972) 17
Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) 12, 18
Lebron v. National R.R. Passenger Corp., 513 U.S. 374 (1995) 12
Lugar v. Edmundson Oil Co., 457 U.S. 922 (1982) ..
McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892) 12
Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) 15, 16
Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 20
O'Hare Truck Services, Inc. v. City of Northlake, 518 U.S. 712 (1996) 12
Public Utilities Committee v. Pollak, 343 U.S. 451 (1952) 16

TABLE OF AUTHORITIES—Continued

	Page
R.J. O'Brien & Associates, Inc. v. Pipkin, 64 F.3d 257 (7th Cir. 1995)	14
Rendell-Baker v. Kohn, 457 U.S. 830 (1982)	12
Skinner v. Railway Labor Exec. Association, 489 U.S. 602 (1989)	16
Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568 (1985)	20
United States v. Robel, 389 U.S. 258 (1967)	12
United States v. X-Citement Video, Inc., 513 U.S. 64 (1994)	9
STATUTES	
Securities Exchange Act:	
15 U.S.C. § 78f(c)(3)(B)	4
15 U.S.C. § 78o(b)(8)	3, 4
15 U.S.C. § 78o-3(g)(3)(B)	4
15 U.S.C. § 78s(b)(1)	4
15 U.S.C. § 78s(b)(2)	4
15 U.S.C. § 78s(c)	4, 17
15 U.S.C. § 78s(g)(1)(A)	3, 4, 9, 15
15 U.S.C. § 78s(g)(2)	17
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1292(b)	2, 7
28 U.S.C. § 1331	2
28 U.S.C. § 1343	2
28 U.S.C. § 1367	2
REGULATIONS	
17 C.F.R. § 240.15b7-1	6, 8, 13, 15, 19
MISCELLANEOUS	
GAO Report HEHS-94-17 3, *Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes* (March 30, 1994)	6
58 Fed. Reg. 27656 (May 11, 1993)	6
58 Fed. Reg. 45932 (August 25, 1993)	5
60 Fed. Reg. 7241 (February 1, 1995)	5
SEC Release No. 34-11424, 1975 LEXIS 1592 (May 16, 1975)	5

TABLE OF AUTHORITIES—Continued

	Page
SEC Release No. 34-17383, 1980 LEXIS 100 (Dec. 17, 1980)	5
SEC Release No. 34-26805, 1989 SEC LEXIS 843 (May 10, 1989)	5
SEC Release No. 34-40109, SR-NASD-97-77 (June 22, 1998)	10
R. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 Cal. L. Rev. 3 (1997)	12
R. Retkwa, *Forced Arbitration Under Attack*, Registered Representative (Aug. 1998)	10
K. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413 (1989)	12
J. Ware, *Employment Arbitration and Voluntary Consent*, 25 Hofstra L. Rev. 83 (1996)	12

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Tonyja Duffield—plaintiff/appellant below—cross-petitions for a writ of certiorari, conditioned upon this Court granting the petition for writ of certiorari in *Robertson Stephens & Company v. Duffield*, No. 98-237. In that petition, Ms. Duffield's former employer seeks review of the Ninth Circuit's decision in *Duffield v. Robertson Stephens & Company*, 144 F.3d 1182 (9th Cir. 1998), insofar as it holds that Title VII prohibits an employer from unilaterally imposing, as a non-negotiable condition of employment, an agreement compelling its workers to submit Title VII and state civil rights claims to binding securities industry arbitration, thus precluding them from prosecuting their statutory discrimination claims in federal or state court.

Robertson Stephens' petition should be denied for the reasons stated in Ms. Duffield's Brief in Opposition. However, if the petition in No. 98-237 is granted, this Court should also grant Ms. Duffield's cross-petition to enable it to consider a closely related issue, also decided by the Ninth Circuit in this case, which if resolved in Ms. Duffield's favor would preclude compelled arbitration of *all* of her employment claims against Robertson Stephens, not just her statutory discrimination claims.

OPINIONS BELOW

The opinion of the court of appeals is reported at 144 F.3d 1182 and is reprinted in the Appendix to Robertson Stephens' Petition for Certiorari in No. 98-237 ("Pet. App.") at Pet. App. 1a-56a. The district court's opinion of August 26, 1996, denying Ms. Duffield's motion for partial summary judgment, is not reported and appears at Pet. App. 57a-71a. The district court's opinion of March 13, 1997, granting Robertson Stephens' motion to compel arbitration and certifying all arbitration issues in the case for interlocutory appeal, is not reported and appears at Pet. App. 72a-87a. The court of appeals' order of April 21, 1997, granting plaintiff permission to appeal the August 26, 1996 and March 13, 1997 orders pursuant to 28 U.S.C. § 1292(b), is not reported and appears at Pet. App. 88a.

JURISDICTION

The court of appeals' opinion was filed on May 8, 1998. On August 5, 1998, the petition for writ of certiorari in No. 98-237 was docketed. This conditional cross-petition for writ of certiorari is timely filed under Supreme Court Rule 12.5. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Ms. Duffield first invoked federal court jurisdiction in the case under 28 U.S.C. §§ 1331, 1343, and 1367.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent text of the provisions involved is set forth in the appendix to this cross-petition.

STATEMENT OF THE CASE

1. ***Facts.***

Tonyja Duffield was employed by Robertson Stephens as a securities trader from June 1988 until April 1994. Pet. App. 59a. Like every individual who worked as a securities trader or broker in the United States during that period, Ms. Duffield was required as a condition of her employment to sign a securities industry Form U-4 and to register (and remained registered) with each national securities exchange of which her employer was a member—in Ms. Duffield's case, the National Association of Securities Dealers ("NASD") and the New York Stock Exchange ("NYSE"). Pet. App. 9a-10a.[1]

Throughout Ms. Duffield's employment, the NYSE and NASD rules required all registered representatives to arbitrate all employment disputes, at their employer's option, under the exchanges' arbitration rules and procedures. Pet. App. 10a-11a. The Form U-4, which Ms. Duffield was compelled by law to sign as a condition of her employment, required her to abide by rules and regulations of the exchanges with which she registered. Pet. App. 10a. The Securities Exchange Act, 15 U.S.C. § 78s(g)(1)(A), further required the exchanges to enforce compliance with their rules.

Ms. Duffield had no choice about whether to sign the Form U-4 or the mandatory arbitration clause contained

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[1] NASD is technically "a securities association registered pursuant to [the Exchange Act]" (15 U.S.C. § 78o(b)(8))—the only such entity—rather than a national exchange. For simplicity, we refer to NASD as if it were a national exchange, as there is no pertinent difference as to the matters addressed here.

therein. Had she refused, she could not lawfully have been employed as a trader for any U.S. securities industry employer. Pet. App. 9a.

2. ***Mandatory Securities Industry Arbitration.***

The federal scheme that compelled Ms. Duffield to accept mandatory securities industry arbitration as a non-negotiable condition of her employment as a securities trader consists of three interlocking components.

First, the Exchange Act makes it illegal for broker-dealers to trade securities unless they are members of a national securities exchange (15 U.S.C. § 78o(b)(8)), and authorizes the exchanges to adopt rules requiring any person associated with an exchange member to be registered with the exchange. 15 U.S.C. § 78f(c)(3)(B), § 78o-3(g)(3)(B). In addition, the Exchange Act since 1975 has specifically *required* each exchange to comply with its own rules and to enforce compliance with those rules "by its members and persons associated with its members," including securities traders such as Ms. Duffield. 15 U.S.C. § 78s(g)(1)(A).

Second, the Exchange Act prohibits an exchange from coming into existence without SEC approval (15 U.S.C. § 78f, § 78o-3), and requires the exchanges to submit to the SEC all proposed rules and rule changes, including amendments to their employment arbitration rules. The SEC, in turn, is required to review and analyze those proposed rules, and to accept or reject them. The SEC may also abrogate, add to, and delete from existing exchange rules on its own initiative. *See* 15 U.S.C. § 78s (b)(1) ("No proposed rule change shall take effect unless approved by the Commission . . . ."), § 78s(b)(2), § 78s(c) (SEC may "abrogate, add to, and delete from [rules] as the Commission deems necessary or appropriate"). Thus, the rules of the exchanges can only exist as long as the SEC does not eliminate or amend them; those rules cannot be repealed or amended without SEC ap-

proval; and those rules must be enforced by the exchanges, unless the SEC explicitly permits otherwise.

The SEC has regularly exercised its statutory oversight function with respect to the exchanges' employment arbitration rules.[2] Moreover, during the past 25 years the SEC has been the initial source of many of the exchanges' employment arbitration rules, just as it was the initial source for the Form U-4 (which contains the mandatory arbitration clause) that Ms. Duffield signed in 1988.[3] In

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[2] *See, e.g.*, SEC Release No. 34-32802, 1993 SEC LEXIS 2151, 58 Fed. Reg. 45932 (August 25, 1993) (approving amendments to NASD Code of Arbitration Procedure clarifying that the mandatory arbitration provisions apply to "employment-related" disputes and that for "employment discrimination claims the panel must consist of a majority of public arbitrators"; amendments will "ensure that the arbitration of industry employment disputes may be compelled at the instance of one of the parties to the dispute"); SEC Release No. 34-35314, 1995 SEC LEXIS, 60 Fed. Reg. 7241 (February 1, 1995) (approving NASD arbitration rule changes governing "certain large and complex" cases, including employment discrimination cases, to establish fee schedules, to require that at least one arbitrator be an attorney; rejecting comments objecting to mandatory arbitration of employment disputes and to limited discovery rights); SEC Release No. 34-26805, 1989 SEC LEXIS 843 (May 10, 1989) (approving detailed changes to arbitration procedures, including fee, discovery, and panel selection matters, and rejecting public comments requesting, *inter alia*, that arbitrators be required to state the reasons for their decisions).

[3] *See, e.g.*, SEC Release No. 34-17383, 1980 LEXIS 100 (Dec. 17, 1980) (Form U-4); SEC Release No. 34-11424, 1975 LEXIS 1592 (May 16, 1975) (same); SEC Release No. 34-26805, 1989 SEC LEXIS 843 (May 10, 1989) at 4 (during the past two decades, "[t]he majority of the proposals to amend the [exchanges' arbitration] rules were . . . in response to the . . . Commission letters"); *id.* at 3-5, 7, 16, 22, 31, 32, 44 n.51, 51 n.59 (describing the SEC's ongoing series of letters to the exchanges, communicated through Securities Industry Conference on Arbitration, that presented the SEC's views on the exchanges' arbitration procedures, "requested [that the exchanges] amend their rules" to conform to the SEC's views, and resulted in a series of proposed rule changes that were "develop[ed] in response to the Commission's letters").

addition, the SEC's staff has long engaged in comprehensive discussions with the exchanges about their securities arbitration rules and procedures, and has systematically reviewed those procedures and the exchanges' arbitration case files pursuant to the SEC's responsibilities under the Exchange Act.[4]

Third, beginning in 1993, the SEC by regulation (17 C.F.R. § 240.15b7-1) explicitly required all traders to be registered with a national securities exchange. However, although that regulation conferred additional enforcement powers upon the SEC, it did not impose new registration requirements on securities traders, like Ms. Duffield, who were already trading on exchanges that required registration (such as the NASD and NYSE). *See* 58 Fed. Reg. 27656, 27657 (May 11, 1993). Those exchanges already had mandatory registration rules, and federal law already required the exchanges to enforce those rules and not to eliminate or amend them without SEC approval.

3. ***District Court Proceedings.***

Ms. Duffield filed her Complaint against Robertson Stephens on January 11, 1995. Pet. App. 59a. She alleged that Robertson Stephens subjected her to sexual discrimination, sexual harassment and retaliation in violation of Title VII of the 1964 Civil Rights Act and California's Fair Employment and Housing Act ("FEHA"). She further alleged that Robertson Stephens had engaged in common law breaches of contract, fraud, deceit, and intentional and negligent infliction of emotional distress. Pet. App. 12a.

Preliminarily, Ms. Duffield's Complaint sought a declaratory judgment that she could not be forced to arbitrate her disputes under the mandatory Form U-4 arbitration

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[4] *See* Buck Depo. at 23, 155 & Ex. 45 (included in Appellant's Excerpts of Record in the court of appeals, Tab F); GAO Report HEHS-94-17, *Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes* (March 30, 1994) at 3.

clause. Pet. 12a. She presented five interrelated challenges to the enforceability of mandatory securities industry arbitration in support of that claim (*See* Pet. App. 12a), none of which had been addressed or decided in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Among them was her claim that securities industry arbitration is a governmentally-mandated condition of employment that unconstitutionally deprives securities industry employees of their rights under Article III, the Fifth Amendment, and the Seventh Amendment. Pet. App. 12a, 48a-49a.

In the district court, the parties conducted extensive discovery into the workings of the securities industry's arbitration system and the extent of the SEC's involvement and oversight. Following discovery, Ms. Duffield moved for summary judgment on her declaratory judgment claim. The district court denied her motion and subsequently granted Robertson Stephens' motion to compel arbitration, rejecting each of Ms. Duffield's challenges to mandatory securities industry arbitration. Pet. App. 57a, 72a. However, the district court certified its orders for interlocutory appeal under 28 U.S.C. § 1292(b) and stayed its order compelling arbitration pending an appellate decision. Pet. App. 87a.

4. ***Court of Appeals Decision.***

The Ninth Circuit granted interlocutory review under 28 U.S.C. § 1292(b). Pet. App. 88a. After briefing and argument, the panel reversed the district court in part, affirmed in part, and remanded the case for further proceedings. Pet. App. 56a.

The court of appeals agreed with Ms. Duffield (and the Equal Employment Opportunity Commission as *amicus*) that Congress, in enacting the Civil Rights Act of 1991, intended to preclude compulsory pre-dispute arbitration agreements, unilaterally imposed as a non-negotiable condition of employment, that force workers to

arbitrate Title VII and state FEHA claims rather than to litigate such claims in federal or state court. The court of appeals therefore reversed the district court's order insofar as it compelled arbitration of Ms. Duffield's *statutory discrimination* claims. Robertson Stephens' petition for writ of certiorari in No. 98-237 concerns that aspect of the court of appeals' ruling.

Having ruled that plaintiff could proceed in federal court on her statutory discrimination claims, the Ninth Circuit found it unnecessary to consider all but one of Ms. Duffield's remaining challenges, which presented alternative grounds for reaching the same result. Pet. App. 22a n.7. The court was required to address Ms. Duffield's unconstitutional conditions argument because, if accepted, that argument would have entitled Ms. Duffield to litigate not only her statutory claims but her state common law contract and tort claims as well.

The court of appeals acknowledged that securities industry arbitration *is* governmentally compelled for every securities trader who signed a Form U-4 after May 1993 —the effective date of the SEC regulation requiring all traders to be registered with a national securities exchange (and thereby to be bound by the exchange's mandatory arbitration rules). Adopting the analysis of the D.C. and Seventh Circuits, the court characterized this registration requirement as " 'constitut[ing] government action of the purest sort.' " Pet. App. 51a, *quoting Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995), *cert. denied* 517 U.S. 1119 (1996). Nonetheless, the court refused to reach the merits of Ms. Duffield's unconstitutional conditions argument, concluding that the SEC's promulgation of 17 C.F.R. § 240.15b7-1 in 1993 did not affect securities traders like Ms. Duffield who were hired *before* 1993. The court thus rejected plaintiffs' argument that the SEC regulation constituted a federally-mandated condition upon her *continued* employment after 1993, because that regulation required her to *remain* registered with the NASD and NYSE and thus bound by their rules. The

court also rejected plaintiff's additional argument that "state action" existed before 1993 in any event, both because 15 U.S.C. § 78s(g)(1)(A) *already* required the exchanges to enforce their SEC-approved rules against all members and persons associated with those members, and because the SEC was actively involved in formulating the content and scope of the exchanges' mandatory arbitration rules and procedures long before 1988.

REASONS FOR GRANTING THE WRIT

Robertson Stephens has petitioned this Court for a writ of certiorari to review the Ninth Circuit's holding that Ms. Duffield may litigate her statutory discrimination claims in court. Ms. Duffield opposes that petition for the reasons stated in her Brief in Opposition. If this Court grants Robertson Stephens' petition, however, it should also grant this cross-petition. Only by granting both petitions can this Court fully resolve the interrelated challenges to mandatory securities industry arbitration raised in this and other cases, including the challenge to unilaterally-imposed mandatory arbitration of state common law claims.[5]

Robertson Stephens argues that the need for certainty requires this Court to resolve the legality of mandatory

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[5] As the prevailing party on the Question Presented in Robertson Stephens' petition, Ms. Duffield is entitled, without filing a cross-petition, to defend the judgment on any ground properly raised below, "provided that an affirmance on the alternative ground would neither expand nor contract the rights of either party established by the judgment below." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39 (1989); *see also United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 n.7 (1984); *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982). Ms. Duffield may therefore defend on the basis of any of her arguments, including her unconstitutional conditions argument (to the extent it encompasses her right to pursue statutory discriminatory claims in court). However, because a favorable ruling on that argument would also entitle her to pursue in court her state common law claims, this Court must grant her cross-petition to be in a position to resolve the entire case.

arbitration in the context of this case (*see* Petition at 28-29), even though other circuit courts have just begun to address similar challenges and notwithstanding recent fundamental changes to the mandatory securities industry arbitration system.[6]

Although Ms. Duffield disagrees with Robertson Stephens' argument for the reasons stated in the Brief in Opposition, if the Court concludes that certiorari should be granted to resolve the pending challenges, this cross-petition should be granted as well. Otherwise, the "unconstitutional conditions" challenge to mandatory arbitration in the securities industry—and specifically, its application to state common law claims—will remain unresolved, regardless of how the Court answers the Question Presented by Robertson Stephens.[7] Moreover, as we ex-

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[6] As explained in the Brief in Opposition, the SEC on June 22, 1998 approved sweeping amendments to the NASD's arbitration rules, exempting all employment discrimination and sexual harassment claims from that exchange's mandatory securities industry arbitration requirement effective January 1, 1999. *See* SEC Order Granting Approval To Proposed Rule Change Relating to the Arbitration of Employment Discrimination Claims, SR-NASD-97-77, SEC Release No. 34-40109 (June 22, 1998). The SEC has recently called upon the NYSE and other exchanges to submit similar amendments to their mandatory arbitration rules for SEC approval; the NYSE is expected to vote in early September 1998 whether to follow the NASD's lead and abandon mandatory arbitration of statutory discrimination claims. *See* Rosalyn Retkwa, *Forced Arbitration Under Attack*, Registered Representative 79 (August 1998). If that occurs, Robertson Stephens' petition in No. 98-237 may be rendered moot, depending on how the new NYSE rules apply to pending lawsuits.

[7] Cases in which other plaintiffs are pressing the same "state action/unconstitutional conditions" challenge to mandatory securities industry arbitration are now pending before other circuits, and involve workers whose dates of hire are both before and after 1993. *See, e.g., Koveleskie v. SBC Capital Markets, Inc.* (7th Cir. No. 98-1793) (employee hired in 1992); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1st Cir. No. 98-1426) (employee hired in 1994); *Desiderio v. NASD, Inc.* (2d Cir. No. 98-6100)

plain below, the Ninth Circuit's ruling that "state action" exists only as to securities industry employees hired after May 1993 is not only wrong, but is inconsistent with other circuit court decisions and with several of this Court's "state action" precedents.

1. In *Gilmer*, this Court rejected a *facial* challenge to the securities industry's arbitration scheme as applied to an employee's claim for violation of the Age Discrimination in Employment Act. The Court concluded, based on the "speculat[ive]" and "generalized" arguments presented, that securities industry arbitration constituted a simple change of "forum" with no corresponding deprivation of substantive rights, and that judicial review of arbitration awards would likely be sufficient to correct any problems. *Id.* at 27-28, 30-32.[8] However, the unconstitutional conditions issue was not presented in *Gilmer*. Nor has this Court ever considered that issue with respect to mandatory securities industry arbitration of employment claims.

a. The doctrine of unconstitutional conditions prohibits the government from conditioning a worker's employment upon a waiver of that worker's constitutional rights. This doctrine has long put to rest "Justice Holmes' famous dictum that a policeman 'may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.'" *Bd. of Cty. Com'rs v. Umbehr*, 116 S.Ct.

(employee offered job in 1996; job offer withdrawn after she refused to sign Form U-4 mandatory arbitration clause).

Because the unconstitutional conditions argument, if accepted, would pretermit all other challenges to mandatory securities industry arbitration (because it encompasses all underlying merits claims), the Questions in this cross petition are logically considered prior to the Question Presented in Robertson Stephens' petition, which concerns statutory discrimination claims only.

[8] Ms. Duffield's Brief in Opposition summarizes the undisputed post-*Gilmer* evidence, developed through almost two years of discovery in this case, that in actual practice securities industry arbitration has not proven to be just another forum to vindicate statutory rights, but in fact leads to a deprivation of those rights.

2342, 2347 (1996), *quoting McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517 (1892).[9] Ms. Duffield argued below that the federal government is ultimately responsible for the requirement of mandatory securities industry arbitration. She further argued that this requirement imposes a non-negotiable condition of employment that unconstitutionally deprives her of her right under Article III of the Constitution not to be forced by the federal government to adjudicate her employment claims in a non-Article III forum, her Seventh Amendment right to a jury trial, and her Fifth Amendment rights to due process and equal protection.

b. The "state action" inquiry ultimately turns on whether there is "a sufficiently close nexus between the State and the challenged action" such that "the alleged infringement of [constitutional] rights [is] fairly attributable to the State." *Lebron v. Natl. R.R. Passenger Corp.*, 513 U.S. 374, 408 (1995) (O'Connor, J., dissenting), *quoting from Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974), *and Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982). This Court has acknowledged that the "state action" doctrine has confused the lower courts and that it requires further development by this Court. "It is fair to say that 'our cases deciding when private action might be deemed that of the state have not been a model of consistentcy.'" *Lebron*, 513 U.S. at 378, *quoting Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 632 (1991).

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[9] *See also Greene v. McElroy*, 360 U.S. 474 (1959) (independent contractors); *United States v. Robel*, 389 U.S. 258 (1967); *O'Hare Truck Services, Inc. v. City of Northlake*, 518 U.S. 712 (1996); *Barron v. Burnside*, 121 U.S. 186 (1887) (state may not condition corporation's license to do business upon waiver of Article III right to sue in federal court); *Herndon v. Chicago, Rock Island & Pacific Railway Co.*, 218 U.S. 135 (1910) (same); *see generally* K. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413 (1989); R. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 Cal. L. Rev. 3 (1997); J. Ware, *Employment Arbitration and Voluntary Consent*, 25 Hofstra L. Rev. 83 (1996).

The court of appeals rejected Ms. Duffield's unconstitutional conditions argument after concluding that mandatory securities industry arbitration was not pursuant to state action when she was initially hired and signed her Form U-4 in 1988. Pet. App. 51a-55a. The court acknowledged, however, that if plaintiff had signed her Form U-4 *after* 1993, the exchanges' mandatory arbitration rules *would* constitute state action, because:

> [i]n 1993, . . . the Securities and Exchange Commission (SEC) adopted a regulation that required all broker-dealers to be registered with at least one of the securities organizations of which Duffield's firm was a member—i.e., the NASD and the NYSE—before effecting any securities transaction. *See* 17 C.F.R. § 240.15b7-1 (adopted May 11, 1993). That registration regulation, like the SEC's registration regulation at issue in *Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995), *cert. denied*, 116 S.Ct. 1351 (1996), "operates not as a private compact among brokers and dealers but as federal law." *Id.* at 941. Hence, to borrow *Blount's* reasoning, as a government-mandated "condition to any participation in a . . . securities career," the current requirement that new employees register with a national securities exchange "constitutes government action of the purest sort." *Id.* [Pet. App. 51a.]

The court of appeals' distinction between employees hired before and after 1993 does not withstand scrutiny.

2a. The Ninth Circuit was correct that the promulgation of 17 C.F.R. § 240.15b7-1 in May 1993 is sufficient, standing alone, to trigger constitutional scrutiny of mandatory securities industry arbitration for traders hired after that date. The SEC's requirement that traders be registered with an exchange as a condition of trading securities placed the government's imprimatur—indeed, its mandate—upon the exchanges' rules (including their mandatory arbitration rules). Indeed, that is precisely

the conclusion, on similar facts, reached by the two other circuit courts to address the issue.

In *Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995), *cert. denied*, 517 U.S. 1119 (1996), the D.C. Circuit considered a constitutional challenge to a rule, promulgated by the Municipal Securities Rulemaking Board ("MSRB") and approved by the SEC, that regulated political contributions by municipal securities broker-dealers. 61 F.3d at 939. Intervenor MSRB defended on the ground that it was a private organization whose rules were not subject to constitutional scrutiny. *Id.* at 941. The D.C. Circuit rejected this argument, concluding that even if the MSRB were a private organization, enforcement of its rules would constitute state action because, under federal law, all municipal securities broker-dealers, as a condition of employment in the industry, were required to register with the MSRB and to obey its SEC-approved rules. *Id.* Because of the registration requirement, those MSRB rules "operat[ed] not as a private compact among brokers and dealers but as federal law." *Id.*

Similarly, in *R.J. O'Brien & Assoc., Inc. v. Pipkin*, 64 F.3d 257 (7th Cir. 1995), the Seventh Circuit found state action in the mandatory arbitration rules of the National Futures Association ("NFA"), a private organization with which commodities futures brokers were required to register as a condition of trading commodities futures. 64 F.3d at 259. Despite the private nature of the NFA, the Seventh Circuit found state action because federal law required the broker to register with the NFA, and thus to comply with its rules, including its mandatory arbitration rules. *Id.* at 262.

b. In limiting its state action finding to the *post*-1993 period, however, the Ninth Circuit ignored an even stronger argument supporting state action, because when Ms. Duffield was hired in 1988, the Securities Exchange Act *already* required Ms. Duffield to be registered with the NASD and NYSE and to comply with their mandatory arbitration rules as a condition of her lawful em-

ployment as a securities trader. Since 1975, 15 U.S.C. § 78s(g)(1)(A) has required national securities exchanges to enforce compliance with their (SEC-approved) rules "by [their] members and persons associated with their members," including securities traders such as Ms. Duffield. When Ms. Duffield signed her Form U-4 in 1988, NASD and NYSE rules required registration by securities traders. *See* NYSE Rule 345(a); NASD Manual ¶ 1785. More importantly, those rules also required mandatory arbitration under the exchanges' SEC-approved rules. Pet. App. 10a-11a. Thus, at the time plaintiff was hired, the mandate of federal law already bound her to comply with the NASD's and NYSE's arbitration rules, and she could not avoid those rules if she wished to pursue her chosen occupation as a securities trader. Contrary to the court of appeals' assumption, then, 17 C.F.R. § 240.15b7-1 added no *new* government mandate. Rather, 15 U.S.C. § 78a(g)(1)(A) had already deputized the exchanges to formulate and enforce compliance with rules to which securities traders like Ms. Duffield would be bound.

There is no difference, as either a practical or legal matter, between: 1) a federal regulation requiring registration with an exchange; and 2) a federal statute requiring exchanges to enforce their rules requiring registration and providing that those rules cannot be eliminated or modified without explicit SEC approval. In both instances, federal law requires securities industry employees to choose between: 1) registering with an exchange and thereby accepting mandatory arbitration; and 2) finding some other job outside of their chosen profession. In both instances, only the SEC has the legal authority to eliminate the mandatory registration and arbitration requirements, regardless of what the exchanges, employers, employees, or any other ostensibly "private" actors may prefer.[10] Thus, the court of appeals' distinction between

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[10] *Compare Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), which involved a private club with racially discriminatory by-laws. The club was licensed by a state liquor commission, which had a

the degree of federal compulsion pre- and post-1993 is meaningless, and its decision cannot be reconciled with *Blount*, *R.J. O'Brien*, or the precedents of this Court on which those decisions rely.

c. The Ninth Circuit's analysis is also inconsistent with the established line of cases holding that state action exists where the government "has provided such significant encouragement, either overt or covert, that the [private party's] choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); *see, e.g., Skinner v. Railway Labor Exec. Ass'n*, 489 U.S. 602, 615-16 (1989) (allowing a constitutional challenge to a private railroad's drug-testing of employees pursuant to federal regulations that authorized but did not compel drug-testing, because federal regulation of discretionary procedures demonstrated that "the Government did more than adopt a passive position toward the underlying private conduct").[11] Here the federal government

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regulation requiring that "[e]very club licensee shall adhere to all of the provisions of its Constitution and Bylaws." *Id.* at 177. This Court found that the liquor commission's requirement that the club enforce its (discriminatory) bylaws was state action. *Id.* at 178-79. Ms. Duffield, of course, presents a much stronger case for state action than was present in *Moose Lodge* because, among other things, the SEC itself reviews and approves the rules of the exchanges, while in *Moose Lodge* the state liquor commission had no apparent involvement in the substance of the discriminatory by-law provision.

[11] *See also Public Utilities Comm. v. Pollak*, 343 U.S. 451, 462 (1952) (private transit company's policy of playing music through bus loudspeakers constitutes state action because the policy was reviewed and approved by government officials). Although state action was not found in *Blum v. Yaretsky*, 457 U.S. 991, that was because the challenged decisions were made by private doctors pursuant to their independent exercise of professional judgment, free from government influence. *See, e.g.*, 457 U.S. at 1006 ("the physicians, and not the forms, make the decision about whether patient's care is medically necessary. A physician can authorize a patient's admission to a nursing facility despite a 'low' score on the form"); *id.* at 1006 n.16 (the physicians "render medical judgments concerning the patient's health needs that the State does not prescribe and for which it is not responsible").

went well beyond compelling the exchanges to enforce their registration and mandatory arbitration rules against Ms. Duffield, because the federal government was actively involved in formulating those mandatory arbitration rules and has for many years closely overseen their implementation.

The SEC exercises plenary control over the scope and content of every arbitration rule that the exchanges propose to adopt. Nowhere is this power illustrated more clearly than in the SEC's recent approval, after six months of consideration, of the NASD's proposal to abandon mandatory arbitration of employment discrimination claims. *See supra* at 10 n.6. The NASD's proposed rule change could not have taken effect until the SEC reviewed and approved it, established its effective date (which was earlier than the NASD originally had proposed), and determined that it would apply to NASD arbitration only (although SEC unquestionably had statutory authority to extend the rule change to all registered exchanges, and to provide for an earlier effective date). *See* 15 U.S.C. § 78s(c); *see also* § 78s(g)(2) (authorizing SEC to "relieve any self-regulatory organization of any responsibility . . . to enforce compliance with any . . . rules or regulations . . . by any member of such organization or person associated with such a member").

The SEC has repeatedly exercised its oversight authority with respect to the exchanges' mandatory employment arbitration rules, just as it did with respect to the NASD's recent rule change and with the securities industry's Form U-4. Many of those rules, including several that are at the heart of Ms. Duffield's due process challenge to the adequacy of mandatory securities industry arbitration, were initially proposed by the SEC itself. *See supra* at 5; *cf. InterContinental Indus., Inc. v. Amer. Stock Exchange*, 452 F.2d 935, 941 & n.9 (5th Cir. 1971), *cert. denied*, 409 U.S. 842 (1972) (SEC's control over NYSE rulemaking subjects those rules to due process review). Moreover, the SEC staff has also conducted a

longstanding dialogue with the exchanges about those arbitration rules and procedures, resulting in a consensus between industry and the SEC (but not Ms. Duffield or other plaintiffs) concerning what modifications would be submitted for SEC approval. *See supra* at 5-6. These facts make this a far stronger "state action" case than *Blount* or *R.J. O'Brien*, because nothing in those cases suggests that the government was actively involved with the *substance* of the rules being enforced.[12]

The Ninth Circuit unduly minimized the federal government's involvement in the exchanges' mandatory arbitration rules and procedures by considering each strand of government involvement separately, rather than evaluating them as part a cohesive, interdependent whole. *See* Pet. App. 53a. Under the comprehensive federal scheme, Ms. Duffield could not be lawfully employed in her chosen profession as a securities trader without agreeing to arbitrate her claims under rules and procedures that a federal agency had been active in formulating, that it had formally approved, and over which it exercised continuing oversight review. Federal law also prohibited the exchanges from modifying those rules and procedures without the federal agency's approval, while that agency had unilateral power to change those rules at any time. The resutling scheme is thus "fairly attributable" to the state within the meaning of this Court's state action authorities. *See, e.g., Lugar v. Edmundson Oil Co.*, 457 U.S. 922, 937 (1982) and cases cited *supra* at 16 & n.11.

d. The Ninth Circuit also seriously misapplied the unconstitutional conditions doctrine by focusing exclusively

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[12] These facts also distinguish this case from *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), in which a state agency merely did not act to disapprove a tariff filed by a utility company. There was no evidence in *Jackson* that the agency was aware of the provision of the tariff being challenged, much less that the agency had any role in formulating, or even consulting with, the utility company about that provision. We also note that *Jackson* involved a business corporation, not a regulatory organization deputized by the federal government to help police the securities industry.

on 1988—when Ms. Duffield initially signed her Form U-4—as the only relevant date for evaluating the federal government's involvement. Under the unconstitutional conditions doctrine, the pertinent inquiry should have been whether a government-mandated condition was imposed as a prerequisite for Ms. Duffield's continuing employment at *any* relevant time—not just on the date of her initial hiring. Even if "state action" did not arise until the promulgation of 17 C.F.R. § 240.15b7-1 in 1993, it should have been found in this case, because that regulation required Ms. Duffield to be registered with an exchange (and therefore to accept mandatory arbitration of any employment claims that arose) when *each* of the events occurred that gave rise to her claims on the merits.

Ms. Duffield could not have withdrawn her registration while continuing to be employed, unless the SEC first changed its registration regulation. Nor could Robertson Stephens have withdrawn from membership in an exchange and remained in business, absent a change in federal law. Nor could the NASD or NYSE have modified their Form U-4 arbitration rules and procedures absent SEC approval. Thus, even if the 1993 regulation were the determinative factor in the "state action" inquiry, after 1993 that federal regulation unquestionably imposed an unwaivable condition upon Ms. Duffield's continued employment. Ms. Duffield may have been free to negotiate higher wages or better benefits as the *quid pro quo* for continuing to work. But because of federal law, registration with an exchange (and therefore mandatory arbitration) constituted a non-negotiable condition of employment if Ms. Duffield wished to continue working in her chosen profession for any securities firm doing business in the United States. She was therefore forced, before and *after* 17 C.F.R. § 240.15b7-1 took effect in 1993, to choose between her continued employment and her constitutional rights.

3. Once the "state action" threshold is crossed, it necessarily follows that the securities industry's mandatory arbitration rules imposed an unconstitutional, and there-

fore unenforceable, condition of employment on Ms. Duffield by depriving her of constitutional rights.

a. Article III of the Constitution vests the "judicial Power of the United States" in courts whose judges have lifetime tenure and salary protection. Under this Court's precedents, the federal government may not consign parties to the jurisdiction of a non-Article III forum to resolve essentially private, state-law claims, at least not without the parties' consent. *See Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 848-50 (1986); *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 584 (1985) ("Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action, without *consent* of the parties. . . ." (emphasis supplied)); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 84 (1982) (plurality opinion).

Under the unconstitutional conditions doctrine, Ms. Duffield cannot be said to have "consented" to have her statutory and common law claims relegated to the securities industry arbitration forum because her "agreement" was compelled by federal authority and imposed as a non-negotiable condition of her employment. This case is therefore unlike *CFTC v. Schor*, where plaintiffs were deemed to have consented to have a non-Article III tribunal hear counterclaims against them because they submitted their affirmative claims to the same non-Article III tribunal. Ms. Duffield filed all *her* claims in court and she strenuously argued from the outset that she should be permitted to litigate those claims in court.

b. The Seventh Amendment precludes the federal government from depriving litigrants of the right a trial by jury on claims that "involve[] rights and remedies of the sort typically enforced in an action at law." *Curtis v. Loether*, 415 U.S. 189, 195 (1974). Ms. Duffield's state common law tort and contract claims unquestionably "involve[] rights and remedies of [that] sort." While the

right to a jury may be waivable, the only arguable "waiver" by Ms. Duffield is the Form U-4 she was forced to sign as a non-negotiable, federally-mandated condition of employment, and her Complaint against Robertson Stephens contains an express demand for a jury trial. Again, the unconstitutional conditions doctrine requires the conclusion that the imposition of such a mandatory surrender of a constitutional right is not a voluntary waiver but an unconstitutional condition that that impermissibly compromises Seventh Amendment rights.

c. With respect to the Fifth Amendment right to due process, mandatory securities industry arbitration denies Ms. Duffield the right, enjoyed by workers in all other industries, to have her claims decided by a tribunal that is required to apply pertinent statutes and case precedents. Ms. Duffield's Brief in Opposition summarizes the undisputed record evidence demonstrating, *inter alia*: that securities industry arbitrators are expressly instructed that they may ignore the law in favor of their own sense of "fairness"; that they do in fact ignore the law, such as by denying attorney's fees to prevailing plaintiffs who have a statutory entitlement to them and by imposing steep "forum fees" of tens of thousands of dollars upon litigants, including prevailing plaintiffs; that empirical studies show that securities industry arbitrators are more likely than courts to rule for employers on employment claims and to award lower damages when a plaintiff does prevail; and that securities industry arbitrators are instructed not to provide reasoning for their decisions (and do not, in fact, provide reasoning in their largely staff-written arbitration awards) so as to make meaningful judicial review of the substance of their decisions impossible. That record establishes a violation of plaintiff's fundamental due process rights. The ultimate due process right is the right to have one's claim resolved in accordance with the governing law. Although a plaintiff may voluntarily agree to have a statutory dispute resolved under inadequate procedures, the government cannot *compel* a plaintiff to submit to such procedures as a con-

dition of obtaining, or retaining, employment in her chosen profession.

CONCLUSION

For the foregoing reasons, if the Court grants Robertson Stephens' petition for a writ of certiorari, this cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

CONSTITUTIONAL, STATUTORY, and REGULATORY PROVISIONS INVOLVED

(a) Article III, Section 1 of the United States Constitution provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

* * * *

(b) The Fifth Amendment to the United States Constitution provides, as here pertinent:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

(c) The Seventh Amendment provides, as here pertinent:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .

(d) The Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*, provides, as here pertinent:

§ 78f. National securities exchanges

(a) Registration; application

> An exchange may be registered as a national securities exchange under the terms and conditions hereinafter provided in this section and in accordance with the provisions of section 78s(a) of this title, by filing with the Commission an application

for registration in such form as the Commission, by rule, may prescribe containing the rules of the exchange and such other information and documents as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) Determination by Commission requisite to registration of applicant as a national securities exchange

An exchange shall not be registered as a national securities exchange unless the Commission determines that—

(1) Such exchange is so organized and has the capacity to be able to carry out the purposes of this chapter and to comply, and (subject to any rule or order of the Commission pursuant to section 78q(d) or 78s(g)(2) of this title) to enforce compliance by its members and persons associated with its members, with the provisions of this chapter, the rules and regulations thereunder, and the rules of the exchange.

* * * *

(6) The rules of the exchange provide that (subject to any rule or order of the Commission pursuant to section 78q(d) or 78s(g)(2) of this title) its members and persons associated with its members shall be appropriately disciplined for violation of the provisions of this chapter, the rules or regulations thereunder, or the rules of the exchange, by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction.

* * * *

(c) Denial of membership in national exchanges; denial of association with member; conditions; limitation of membership

* * * *

(3)(A) . . . .

(B) . . . . A national securities exchange may . . . require any person associated with a member, or any class of such persons, to be registered with the exchange in accordance with procedures so established.

* * * *

§ 78o. Registration and regulation of brokers and dealers

* * * *

(b)(8) It shall be unlawful for any registered broker or dealer to effect any transaction in, or induce or attempt to induce the purchase or sale of, any security (other than or commercial paper, bankers' acceptances, or commercial bills), unless such broker or dealer is a member of a securities association registered pursuant to section 78o-3 of this title or effects transactions in securities solely on a national securities exchange of which it is a member.

§ 78o-3. Registered securities associations

(a) Registration; application

An association of brokers and dealers may be registered as a national securities association pursuant to subsection (b) of this section, or as an affiliated securities association pursuant to subsection (d) of this section, under the terms and conditions hereinafter provided in this section and in accordance with the provisions of section 78s(a) of this title, by filing with the Commission an application for registration in such form as the Commission, by rule, may prescribe containing the rules of the association and

such other information and documents as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) Determinations by Commission requisite to registration of applicant as national securities association

An association of brokers and dealers shall not be registered as a national securities association unless the Commission determine that—

* * * *

(2) Such association is so organized and has the capacity to be able to carry out the purposes of this chapter and to comply, and (subject to any rule or order of the Commission pursuant to section 78q(d) or 78s(g)(2) of this title) to enforce compliance by its members and persons associated with its members, with the provisions of this chapter, the rules and regulations thereunder, the rules of the Municipal Securities Rulemaking Board, and the rules of the association.

* * * *

(7) The rules of the association provide that (subject to any rule or order of the Commission pursuant to section 78q(d) or 78s(g)(2) of this title) its members and persons associated with its members shall be appropriately disciplined for violation of any provision of this chapter, the rules or regulations thereunder, the rules of the Municipal Securities Rulemaking Board, or the rules of the association, by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction.

* * * *

(g) Denial of membership

* * * *

(3)(A) . . . .

(B) . . . . A registered securities association may . . . require a natural person associated with a member, or any class of such natural persons, to be registered with the association in accordance with procedures so established.

* * * *

§ 78s. Registration, responsibilities, and oversight of self-regulatory organizations

* * * *

(b) Proposed rule changes; notice; proceedings

(1) Each self-regulatory organization shall file with the Commission, in accordance with such rules as the Commission may prescribe, copies of any proposed rule or any proposed change in, addition to, or deletion from the rules of such self-regulatory organization (hereinafter in this subsection collectively referred to as a "proposed rule change") accompanied by a concise general statement of the basis and purpose of such proposed rule change. The Commission shall, upon the filing of any proposed rule change, publish notice thereof together with the terms of substance of the proposed rule change or a description of the subjects and issues involved. The Commission shall give interested persons an opportunity to submit written data, views, and arguments concerning such proposed rule change. No proposed rule change shall take effect unless approved by the Commission or otherwise permitted in accordance with the provisions of this subsection.

* * * *

(c) Amendment by Commission of rules of self-regulatory organizations

The Commission, by rule, may abrogate, add to, and delete from (hereinafter in this subsection collectively referred to as "amend") the rules of a self-regulatory organization (other than a registered clearing agency) as the Commission deems necessary or appropriate to insure the fair administration of the self-regulatory organization, to conform its rules to requirements of this chapter and the rules and regulations thereunder applicable to such organization, or otherwise in furtherance of the purposes of this chapter . . . .

* * * *

(g) Compliance with rules and regulations

(1) Every self-regulatory organization shall comply with the provisions of this chapter, the rules and regulations thereunder, and its own rules, and (subject to the provisions of section 78q(d) of this title, paragraph (2) of this subsection, and the rules thereunder) absent reasonable justification or excuse enforce compliance—

(A) in the case of a national securities exchange, with such provisions by its members and persons associated with its members . . . .

* * * *

(2) The Commission, by rule, consistent with the public interest, the protection of investors, and the other purposes of this chapter, may relieve any self-regulatory organization of any responsibility under this chapter to enforce compliance with any specified provision of this chapter or the rules or regulations thereunder by any member of such organization or person associated with such a member, or any class of such members or persons associated with a member.

* * * *

(e) Title 17 of the Code of Federal Regulations provides, as here pertinent:

* * * *

17 C.F.R. § 240.15b7-1 Compliance with qualification requirements of self-regulatory organizations

No registered broker or dealer shall effect any transaction in, or induce the purchase or sale of, any security unless any natural person associated with such broker or dealer who effects or is involved in effecting such transaction is registered or approved in accordance with the standards of training, experience, competence, and other qualification standards (including but not limited to submitting and maintaining all required forms, paying all required fees, and passing any required examinations) established by the rules of any national securities exchange or national securities association of which such broker or dealer is a member or under the rules of the Municipal Securities Rulemaking Board (if it is subject to the rules of that organization).

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In The

Supreme Court of the United States

October Term, 1998

TONYJA DUFFIELD,

Cross-Petitioner,

vs.

ROBERTSON, STEPHENS & COMPANY,

Cross-Respondent.

On Conditional Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

CROSS-RESPONDENT'S BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page. While the action below was pending, cross-respondent Robertson, Stephens & Co., through a merger, became BancAmerica Robertson Stephens. Pursuant to Rule 29.6 of the Rules of this Court, cross-respondent states that as of August 31, 1998, it became a wholly owned subsidiary of BankBoston Corporation and is known as BancBoston Robertson Stephens. For convenience's sake, however, the text of this brief in opposition refers to cross-respondent as "Robertson, Stephens." BankBoston Corporation has neither a parent corporation nor any subsidiary which is non-wholly owned or publicly traded.

TABLE OF CONTENTS

	Page
PARTIES TO THE PROCEEDING	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
STATEMENT OF THE CASE	1
A. Duffield's Agreements to Arbitrate.	1
B. The NYSE and its Rules.	4
C. Procedural Background.	5
Reasons for Denying the Cross-Petition	7
I. THE NINTH CIRCUIT'S REJECTION OF DUFFIELD'S CONSTITUTIONAL CHALLENGE DOES NOT CONFLICT WITH ANY OTHER CIRCUIT COURT DECISION AND IS CONSISTENT WITH THE DECISIONS OF THIS COURT.	7
A. Duffield Has Not Identified A Court at Any Level That Found State Action in the NYSE or NASD Arbitration Rules.	7
B. The Ninth Circuit Opinion Rejecting The Constitutional Challenge To Securities Arbitration Is Correct.	10

Table of Contents

		Page
1.	The decision below correctly found no state action.	11
2.	Contrary to Duffield's assertion, the Ninth Circuit did not find state action for plaintiffs who signed Form U-4's after 1993.	13
3.	Duffield's constitutional claim fails on the merits as well.	14
II.	THE CROSS-PETITION DOES NOT RAISE AN ISSUE OF FAR-REACHING SIGNIFICANCE.	17
CONCLUSION		19

TABLE OF CITED AUTHORITIES

Page

Cases Cited:

Bahr v. National Ass'n of Sec. Dealers, Inc., 763 F. Supp. 584 (S.D. Fla. 1991) 9

Blount v. Securities and Exchange Commission, 61 F.3d 938 (D.C. Cir. 1995), *cert. denied*, 517 U.S. 1119 (1996) 8

Blum v. Yaretsky, 457 U.S. 991 (1982) 13

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 10

Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) 14

Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 957 F. Supp. 1460 (N.D. Ill. 1997) 9

Datek Sec. Corp. v. National Ass'n of Sec. Dealers, Inc., 875 F. Supp. 230 (S.D.N.Y. 1995) 9

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First Heritage Corp. v. National Ass'n of Sec. Dealers, Inc., 785 F. Supp. 1250 (E.D. Mich. 1992) 9

Table of Cited Authorities

	Page
Geldermann, Inc. v. Commodity Futures Trading Comm'n, 836 F.2d 310 (7th Cir. 1987), *cert. denied*, 488 U.S. 816 (1988)	15
Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 25 (1991)	6, 16
Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989)	15
Hardware Dealers' Mut. Fire Ins. Co. v. Glidden Co., 284 U.S. 151 (1931)	16
Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974)	13
Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982)	11
Lyeth v. Chrysler Corp., 929 F.2d 891 (2d Cir. 1991)	16
Merrill Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117 (1973)	4, 9
Mouton v. Metropolitan Life Ins. Co., 147 F.3d 453 (5th Cir. 1998)	6
National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179	10

Table of Cited Authorities

	Page
Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc., 725 F.2d 537 (9th Cir.), *cert. denied*, 469 U.S. 824 (1984).	14
R.J. O'Brien & Associates, Inc., 64 F.3d 257 (7th Cir. 1995)	7, 8
Seus v. John Nuveen & Co., 146 F.3d 175 (3d Cir. 1998)	6
Shearson/American Express v. McMahon, 482 U.S. 220 (1987)	16
Shrader v. National Ass'n of Secs. Dealers, Inc., 855 F. Supp. 122 (E.D.N.C. 1994), *aff'd without opinion*, 54 F.3d 774 (4th Cir. 1995)	8, 17
Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989)	9
Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568 (1985)	14, 15
United States v. Moore, 340 U.S. 616 (1951)	15
United States v. Solomon, 509 F.2d 863 (2d Cir. 1975)	9

Table of Cited Authorities

	Page
Statutes:	
15 U.S.C. § 78o	7
15 U.S.C. § 78o-4(b)	8
28 U.S.C. § 1292(b)	6
United States Constitution:	
Fifth Amendment	16
Seventh Amendment	14, 15, 16
Rules:	
NYSE Rule 345(a)	4
NYSE Rule 347	4
Other Authority:	
Patrick McGeehan, "Big Board Moves To End Practice On Arbitrations," Wall St. J. at B6 (Sept. 4, 1998)	4, 12

Cross-respondent Robertson, Stephens & Company ("Robertson, Stephens") respectfully submits that the conditional cross-petition of Tonyja Duffield ("Duffield") for a writ of *certiorari* should be denied. Duffield has not identified a single case that conflicts with the holding of the court below which found no state action in the New York Stock Exchange's arbitration rules. Unlike Robertson, Stephens' petition in this matter, the conditional cross-petition does not raise an issue that is often-litigated or generally applicable to employers and employees in every industry. Duffield asks this Court to grant the conditional cross-petition solely to resolve a handful of constitutional challenges to securities industry arbitration. Yet even for this limited purpose, the Court's guidance is not required. The Ninth Circuit, like the other courts to consider New York Stock Exchange ("NYSE") or National Association of Securities Dealers ("NASD") arbitration, correctly applied this Court's decisions in holding that mere regulation or approval of a private entity's decision does not subject the private actor to constitutional limitations.

STATEMENT OF THE CASE

A. Duffield's Agreements to Arbitrate.

On March 31, 1982, Duffield filled out by hand and signed a "WORK COPY" of an application form known throughout the securities industry as a Form U-4. (CR 80, SER 616).[1] On April 30, 1982, Duffield applied for registration with the NYSE, among other entities, by signing a typewritten version of the Form U-4. (*Id.*, SER 623). On the last page of each of the 1982 Form U-4's, just above Duffield's signature and under a header

1. "CR" refers to docket number in the court record below, and citations to "ER" and "SER" refer to the specified pages of Appellant's Excerpts of Record and Appellee's Supplemental Excerpts of Record, respectively.

stating "THE FOLLOWING SHOULD BE READ VERY CAREFULLY BY THE APPLICANT," were six numbered paragraphs. (*Id.* SER 622, 626). Paragraph 5 contained Duffield's agreement to

> arbitrate any dispute, claim, or controversy that may arise between me and my firm . . . that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register . . . (*Id.*)

Duffield passed the Series 7 exam and began working as a securities trader at Piper Jaffray. While at Piper Jaffray, Duffield was told that the NYSE rules were available in the firm's library and was instructed that understanding the NYSE rules was of the utmost importance. (CR 80, SER 614 ¶¶ 6-7, 629, 636). By 1988, Duffield had been promoted to vice president and was the most senior employee on Piper Jaffray's securities trading desk. (CR 1, SER 2 ¶ 7). In June 1988, Duffield, by then a "sophisticated industry insider" (Pet. App. at 78a),[2] left Piper Jaffray to work for Robertson, Stephens.

Duffield completed and signed a new Form U-4 transferring her registration to Robertson, Stephens on June 20, 1988. (Pet. App. at 74a). This Form U-4 was very similar to those she had signed in 1982. The signature page bore the heading, "THE APPLICANT MUST READ THE FOLLOWING VERY CAREFULLY." (CR 78, SER 567). Under the heading and above Duffield's signature were nine numbered paragraphs. Paragraph 1 stated, "I swear or affirm that I have read and understand the items and instructions on this form . . . ." (*Id.*) Paragraph 2 stated:

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2. "Pet. App." refers to the specified pages of the Appendix to Robertson, Stephens' petition for writ of *certiorari*, No. 98-237.

> I hereby apply for registration with the organizations and states indicated in Item 10 [i.e., the NYSE, the NASD, the state of New York and the state of California] . . . and, in consideration of such organizations and states receiving and considering my application, . . . I agree to abide by, comply with, and adhere to all the provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rules and regulations of the states and organizations with which I register . . . (*Id.*)

Paragraph 5 stated:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register. . . . (Pet. App. at 10a).

On July 1, 1993, Duffield received a copy of Robertson, Stephens' personnel guide, which contained a provision requiring arbitration of all disputes "arising out of or relating to the termination of any employee's employment . . . including . . . alleged violations of federal, state and/or local statutes." (CR 78, SER 604). Duffield agreed in writing to abide by the provisions of the personnel guide. (*Id.* SER 605).

After almost six years at Robertson, Stephens, during which time she earned more than $1.9 million (*Id.*, SER 563 ¶ 7), Duffield resigned in April 1994 to work at another securities firm. (CR 77, SER 559 ¶ 4).

B. The NYSE and its Rules.

Robertson, Stephens is a member of the NYSE, a private corporation. (Pet. App. at 10a). NYSE Rule 345(a) prohibits member firms from employing anyone as a "securities trader" unless that person is "registered with, qualified by and is acceptable to" the NYSE. (CR 48, SER 111). The NYSE requires candidates for registration to agree to abide by the NYSE Constitution and Rules (CR 76, SER 555) and has required employees of its member firms to arbitrate disputes with their employers since at least 1958.[3] NYSE Rule 347 currently provides:

> Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules. (Pet. App. at 10a).[4]

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3. CR 33, SER 60; *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 121 (1973).

4. The SEC is currently considering an amendment to Rule 347 proposed by the NYSE which would exempt statutory employment discrimination claims from NYSE arbitration. *See* Appendix to Duffield's Brief in Opposition at 1a (No. 98-237); Patrick McGeehan, "Big Board Moves To End Practice On Arbitrations," Wall St. J. at B6 (Sept. 4, 1998). As explained more fully below, the NASD has already adopted changes to its arbitration rules for new claims filed after January 1, 1999. The NASD's new rule, and the NYSE proposal (if adopted), would eliminate any argument by future claimants that they were required as a condition of employment in the securities industry to arbitrate

(Cont'd)

C. Procedural Background.

Duffield filed the present action in federal court on January 11, 1995. The complaint includes claims for breach of contract, fraud and deceit, intentional and negligent infliction of emotional distress, and violations of Title VII and California's Fair Employment and Housing Act. Duffield also sought a judicial declaration that her agreements to arbitrate were not enforceable. (Pet. App. at 12a).

Duffield moved for partial summary judgment on her declaratory relief claim on the grounds that (1) securities industry arbitration violated her rights under Article III and the Fifth and Seventh amendments to the United States Constitution; (2) the arbitration agreement did not adequately protect her rights under Title VII; and (3) the arbitration agreement was not "voluntary" because federal law required her to register with a national securities exchange, thereby subjecting her to mandatory arbitration under exchange rules. The district court denied Duffield's motion for partial summary judgment on the grounds that (1) there was no state action; (2) the securities industry arbitration scheme adequately protects Duffield's Title VII rights; and (3) Title VII does not require that agreements to arbitrate be "voluntary" as Duffield defined the term. (Pet. App. at 68a, 70a).

(Cont'd)
discrimination claims. However, as stated in Robertson, Stephens' reply brief in support of its petition for a writ of certiorari, the broader question of the arbitrability of Title VII and state discrimination claims remains important to employers and employees in the securities industry and other industries nationwide. Even in the securities industry, where arbitration of discrimination claims will no longer be required across the board for new claims filed after January 1, 1999, employers may require individual employees to agree to arbitrate statutory discrimination claims.

Robertson, Stephens moved to compel arbitration under the Form U-4 agreement or, alternatively, the Robertson, Stephens personnel guide. The district court granted the motion, finding that (1) Duffield's agreement to arbitrate was "knowing," and (2) it was not an unconscionable adhesion contract. (Pet. App. at 80a, 82a). The district court certified its orders of March 13, 1997 and August 26, 1996 under 28 U.S.C. § 1292(b) (Pet. App. at 86a), and the Ninth Circuit accepted the appeal. (Pet. App. at 88a).

The Ninth Circuit reversed in part, holding that agreements to arbitrate entered into as a condition of employment were not enforceable as to Title VII and related state statutory discrimination claims.[5] The Ninth Circuit affirmed the district court's finding that the NYSE arbitration requirement did not violate Duffield's constitutional rights on the ground that state action was lacking.

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5. Rejecting this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), which upheld mandatory arbitration of an Age Discrimination in Employment Act claim, the Ninth Circuit found that Congress intended to preclude arbitration of Title VII and related state statutory discrimination claims. Robertson, Stephens filed its petition based on, among other considerations supporting *certiorari*, decisions from other circuits directly contrary to the decision below. *See, e.g., Mouton v. Metropolitan Life Ins. Co.*, 147 F.3d 453 (5th Cir. 1998); *Seus v. John Nuveen & Co.*, 146 F.3d 175 (3d Cir. 1998).

REASONS FOR DENYING THE CROSS-PETITION

I.

THE NINTH CIRCUIT'S REJECTION OF DUFFIELD'S CONSTITUTIONAL CHALLENGE DOES NOT CONFLICT WITH ANY OTHER CIRCUIT COURT DECISION AND IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

A. Duffield Has Not Identified A Court at Any Level That Found State Action in the NYSE or NASD Arbitration Rules.

In contrast to the square conflict of authority cited in Robertson, Stephens' petition, *see* Pet. at 9, Duffield's conditional cross-petition fails to identify a single decision of a United States court of appeals or this Court that conflicts with the finding below that the NYSE arbitration requirement was private, not state, action. Duffield cites two cases in the cross-petition that supposedly "cannot be reconciled" with the decision below. Cross-Pet. at 16. Duffield artfully avoids stating that the cases pose a square conflict, or any conflict at all, because both are factually distinguishable. One case cited by Duffield — *R.J. O'Brien & Associates, Inc.*, 64 F.3d 257 (7th Cir. 1995) — in fact *supports* the decision below. *R.J. O'Brien* dealt with the National Futures Association ("NFA"), which was required by Congress to register *all* participants in the commodity futures industry. *See id.* at 262. The NYSE, by contrast, does not have an express federal mandate to register all participants in the securities industry, but is merely one of several private national exchanges which, along with a national securities association such as the NASD, is permitted to register brokers and dealers. *See* Cross-Petition Appendix at 3a ("Cross-Pet. App.") (15 U.S.C. § 78o). Finally, *R.J. O'Brien* ultimately supports the result, if not the reasoning, of the Ninth Circuit

below. The Ninth Circuit concluded that there was no constitutional violation because there was no state action. *R.J. O'Brien* reached the same result on the ground that the NFA's mandatory arbitration provision did not violate due process. *See* 64 F.3d at 262-63.

Blount v. Securities and Exchange Commission, 61 F.3d 938 (D.C. Cir. 1995), *cert. denied*, 517 U.S. 1119 (1996), the other case Duffield cites as supposedly inconsistent with the decision below, is distinguishable in that it dealt with the rules of the Municipal Securities Rulemaking Board ("MSRB"), an entity Congress created for the express purpose of regulating municipal securities broker-dealers. *Id.* at 941; 15 U.S.C. § 78o-4(b). *Blount* does not concern private organizations such as the NYSE. Nor does it discuss the issues of mandatory registration or arbitration. In any event, *Blount* could not in its ultimate conclusion be inconsistent with the decision below because, like *R.J. O'Brien*, *Blount* found no substantive constitutional violation. *See Blount*, 61 F.3d at 944-49.

Every decision addressing the issue in Duffield's cross-petition — the constitutionality of NASD or NYSE arbitration — uniformly concludes that such arbitration lacks state action. Only one other United States Court of Appeal has addressed the issue. Without issuing an opinion, the Fourth Circuit United States Court of Appeals affirmed a district court finding that the NASD as the sponsor of an arbitration forum is not "a state actor that would entitle the plaintiff to prosecute a claim for civil rights relief." *Shrader v. National Ass'n of Secs. Dealers, Inc.*, 855 F. Supp. 122, 124 (E.D.N.C. 1994), *aff'd without opinion*, 54 F.3d 774 (4th Cir. 1995).[6] The district courts that

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6. Other circuit courts have found no state action in private arbitration. *See, e.g., Davis v. Prudential Secs., Inc.*, 59 F.3d 1186, 1191 (11th Cir. 1995) ("state action element of a due process claim is absent in private arbitration cases").

have addressed the issue agree. *See Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 957 F. Supp. 1460, 1466 (N.D. Ill. 1997) (NASD arbitration requirement is not state action); *Bahr v. National Ass'n of Sec. Dealers, Inc.*, 763 F. Supp. 584, 588-89 (S.D. Fla. 1991) (same as *Cremin*); *First Heritage Corp. v. National Ass'n of Sec. Dealers, Inc.*, 785 F. Supp. 1250, 1251 (E.D. Mich. 1992) (same as *Bahr* and *Cremin*).[7]

In a related context, this Court observed in *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 135-36 (1973):

> To begin with the obvious, there is nothing in the [Securities Exchange] Act and there is no [Securities and Exchange] Commission rule or regulation that specifies arbitration as the favored means of resolving employer-employee disputes.

Thus, this Court concluded, arbitration was not a federal rule for purposes of preemption under the Supremacy Clause. *Id.* That observation remains as true today as it was 25 years ago — a fact which is fatal to Duffield's constitutional claim.

Duffield has similarly failed to identify any conflict between the decision below and any decision of this Court. Duffield merely cites cases in which, on plainly different facts, this Court found state action. *See, e.g., Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 615 (1989) (federal agency's

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7. NASD and NYSE actions in enforcing rules outside of the arbitration context have similarly been found to be private, not state, action. *See United States v. Solomon*, 509 F.2d 863, 868-69 (2d Cir. 1975) (NYSE's requirement that member answer questions about alleged rule violations under threat of expulsion from NYSE is not state action); *Datek Sec. Corp. v. National Ass'n of Sec. Dealers, Inc.*, 875 F. Supp. 230, 234 (S.D.N.Y. 1995) (NASD's prosecution of disciplinary action against member firm and employees of member firm is not state action).

regulations that show its "strong preference for [drug] testing" transforms private railroad's drug testing into state action).

Duffield argues that the Ninth Circuit erred in failing to appreciate that the SEC "has repeatedly exercised its oversight authority with respect to the exchanges' mandatory employment arbitration rules." Cross-Pet. at 17. However, the appropriate inquiry is not whether certain arbitration procedures were attributable to the SEC, but whether the requirement to arbitrate itself should be deemed the choice of the state. As the Ninth Circuit stated:

> Duffield has pointed to numerous instances of the SEC's oversight and development of the exchanges' arbitration rules and procedures, but she has failed to put forth any example of governmental encouragement or endorsement of the compulsory arbitration requirement itself.

Pet. App. at 55a. Duffield cannot deny that the NYSE has required its members and their registered employees to arbitrate employment disputes since at least 1958, well before the SEC had jurisdiction over the securities exchanges' arbitration rules. Pet. App. 67a-68a.

B. The Ninth Circuit Opinion Rejecting The Constitutional Challenge To Securities Arbitration Is Correct.

The district court and Ninth Circuit properly applied this Court's state action decisions in rejecting Duffield's constitutional challenge to securities industry arbitration. It is axiomatic that constitutional protections "do not extend to 'private conduct abridging individual rights.' " *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (quoting *Burton v. Wilmington Parking Authority*, 365 U.S. 715,

722 (1961)). As the Ninth Circuit stated in the opinion below, constitutional standards apply in this case only if the securities exchanges' arbitration rules are " 'fairly attributable' " to the state. Pet. App. at 49a (quoting *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 936 (1982)).

The district court and Ninth Circuit found state action lacking for several reasons. First, no federal law or regulation in 1988, when Duffield was hired, required her to register with a securities exchange. Pet. App. at 50a, 63a. Second, the SEC has not encouraged or required the securities industry's arbitration rules. *Id.* at 53a. Third, resolving employment disputes is not an exclusive governmental function. *Id.* at 55a. In any event, even if there were state action, securities industry arbitration is unquestionably constitutional.

1. *The decision below correctly found no state action.*

Duffield does not dispute, as the Ninth Circuit found, that when she signed the Form U-4 "no federal statute or regulation required [her] to register with the securities exchanges, much less to sign Form U-4 or to arbitrate employment disputes." Pet. App. at 50a. She attempts to argue around this fact by constructing a daisy chain of state and private rules: the NYSE rules required arbitration of employment disputes with exchange-registered employees; NYSE rules required Duffield to register; and federal law required the NYSE to enforce its rules. Therefore, according to Duffield, federal law required her to arbitrate. *See* Cross-Pet. at 15. The Ninth Circuit rejected this faulty syllogism because it was nonetheless "a NYSE rule, rather than any federal mandate" which was responsible for the challenged action. Pet. App. at 51a n.19.

The private source of the securities industry's arbitration rules is demonstrated by recent changes and proposed changes

to the arbitration requirement regarding employment discrimination disputes. The NASD adopted an amendment to its rules (subsequently approved by the SEC) effective for new claims filed after January 1, 1999, which exempts statutory employment discrimination claims from mandatory arbitration. *See* NASD Notice to Members 98-56 (July 1998).[8] The amended NASD rule permits employers and employees, apart from the Form U-4, to enter into mandatory agreements to arbitrate statutory discrimination claims in the NASD arbitral forum. *Id.*

The NYSE in September 1998 proposed amendments to its arbitration rules which differ in significant respects from the NASD rules change. The NYSE proposal, which has not been approved by the SEC, would prohibit arbitration of statutory discrimination claims in the NYSE forum unless the employer and employee had agreed after the dispute had arisen to arbitrate the claim. *See* Patrick McGeehan, "Big Board Moves to End Practice On Arbitrations," Wall St. J. at B6 (Sept. 4, 1998). Nothing in the proposal would prevent employers from entering into separate agreements to arbitrate discrimination claims in another forum. Under both the recent NASD amendment and the NYSE proposal, members and their employees must still arbitrate common law claims, such as breach of contract, and statutory claims other than discrimination claims. The proposed and recently approved changes to securities industry arbitration rules reflect distinct alternatives, put forward separately by the private exchanges, rather than a lockstep response mandated by the federal government.

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8. The NASD Notice to Members may be viewed on the NASD Regulation website, www.nasdr.com.

2. *Contrary to Duffield's assertion, the Ninth Circuit did not find state action for plaintiffs who signed Form U-4's after 1993.*

Duffield's second argument for state action posits that federal law after 1993 required her to remain registered with an exchange, and thus subject to the exchange's arbitration rules. Cross-Pet. at 19. In advancing this argument, however, Duffield fundamentally misconstrues *dicta* in the decision below. Contrary to cross-petitioner's assertion, the court below did not state that "if plaintiff had signed her Form U-4 *after* 1993, the exchange's mandatory arbitration rules *would* constitute state action." Cross-Pet. at 13. Duffield here confuses two distinct exchange provisions which the Ninth Circuit addressed separately: the registration requirement and the agreement to arbitrate. The Ninth Circuit stated in *dicta* that after 1993, the *registration requirement* " 'constitutes government action of the purest sort.' " Pet. App. at 51a (quoting *Blount*, 61 F.3d at 941). However, as the Ninth Circuit noted, "[i]nsofar as Duffield argues that the 'challenged action' is the requirement that she actually arbitrate her lawsuit, that requirement is found in her private contract, not in federal law." Pet. App. at 52a. The court below went on to explain that,

> the SEC has not exercised sufficient influence over the compulsory arbitration requirement in Form U-4, the NASD procedures, or NYSE rules to deem that requirement the choice of the state.

Pet. App. at 53a. Rather, "the SEC has only acquiesced to NASD's and NYSE's mandatory arbitration rules." *Id.* at 52a n.20. Based on these facts, the Ninth Circuit and district court faithfully and properly applied the holdings of this Court's decisions in *Blum v. Yaretsky*, 457 U.S. 991 (1982), and *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), which instruct

that government regulation, even if pervasive, does not convert private deeds into state action.

3. *Duffield's constitutional claim fails on the merits as well.*

Based on the lack of state action, the courts below looked no farther. Duffield's challenge, however, fails on the ultimate merits as well. Duffield's arbitration agreement does not violate Article III, the Seventh Amendment, or due process. Article III "does not confer on litigants an absolute right to the plenary consideration of every nature of claim by an Article III court." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986). The *Schor* case involved a government agency's requirement that commodity futures brokers arbitrate customer claims against them. *Id.* at 836. Rejecting an Article III challenge, this Court described the arbitration scheme in the commodity futures industry as "of unquestioned constitutional validity" and also required arbitration of related common law claims. *Id.* at 856.

Similarly, in *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), this Court rejected an Article III challenge to Congress's enactment of a regulatory scheme for the pesticide industry requiring binding arbitration of federal rights. *Id.* at 589. As these cases show, the government is free to require mandatory arbitration of state or federal rights. Thus, in the present case, even if there were state action, no violation of Article III occurred as a result of the NYSE requiring arbitration.

Duffield cannot avoid the fact that her agreement to arbitrate constituted a valid waiver of any right to have her claims decided in an Article III court. *See Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 543 (9th Cir.) (en banc) (Article III rights are subject

to waiver), *cert. denied*, 469 U.S. 824 (1984). Duffield's sole argument against finding a valid waiver of her Article III rights is that the arbitration agreement was a federally compelled condition of employment. Cross-Pet. at 20. Although the premise of this argument is erroneous — her agreement to arbitrate was *not* federally compelled — it fails regardless. In *Geldermann, Inc. v. Commodity Futures Trading Comm'n*, 836 F.2d 310 (7th Cir. 1987), *cert. denied*, 488 U.S. 816 (1988), the Seventh Circuit enforced a firm's agreement to comply with federally imposed arbitration rules despite plaintiff's objection that it had not waived its right to an Article III forum. *Id.* at 317-18. Relying on the Supreme Court decision in *Thomas*, the court held that

> the district court's finding that if [the firm] was to continue in business, it had no choice but to accept the [rules at issue] has no impact on the question of [the firm's] consent to follow all of the rules . . . , including the arbitration rules.

Id. at 318.

The failure of Duffield's Article III argument is also fatal to her jury trial claim under the Seventh Amendment. Duffield concedes, as she must, that her Seventh Amendment right to a jury trial is subject to waiver. Cross-Pet. at 20-21; *see also United States v. Moore*, 340 U.S. 616, 621 (1951). Further, it is fundamental that "[i]n a non-Article III forum the Seventh Amendment simply does not apply." *Geldermann*, 836 F.2d at 323; *see also Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53-54 (1989) (right to jury trial is inapplicable in forum with which jury would be incompatible); *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1155 n.12 (5th Cir. 1992) ("Seventh Amendment does not preclude 'waiver' of the right to a jury trial through the signing of a valid

arbitration agreement"), *cert. denied*, 506 U.S. 1079 (1993). Because Duffield's arbitration agreement was a valid waiver of an Article III forum, the Seventh Amendment is simply not implicated.

Finally, Duffield argues that requiring her to arbitrate violates her due process rights under the Fifth Amendment. Due process does not require, as Duffield seems to suggest, a constitutional right of access to the courts. *See Hardware Dealers' Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 159-60 (1931) (rejecting due process challenge to mandatory arbitration of certain disputes between fire insurers and their insureds); *Lyeth v. Chrysler Corp.*, 929 F.2d 891, 896 (2d Cir. 1991) (rejecting due process challenge to mandatory arbitration of claims against auto manufacturer under New York's "Lemon Law"). Without citation to a single authority, Duffield relies on a supposed due process right "to have her statutory claims decided by a tribunal that is required to apply pertinent statutes and case precedents." Cross-Pet. at 21. This argument ignores the district court's finding, which was not addressed by the Ninth Circuit, that the arbitral forum would adequately protect Duffield's Title VII rights. Pet. App. at 70a. The argument must fail, moreover, in light of this Court's recognition that NYSE arbitration procedures are fair, adequate, and fully capable of vindicating important statutory rights. *See Gilmer v Interstate/ Johnson Lane Corp.*, 500 U.S. 25, 30-32 & n.4 (1991); *Shearson/American Express v. McMahon*, 482 U.S. 220, 231-32 (1987).

II.

THE CROSS-PETITION DOES NOT RAISE AN ISSUE OF FAR-REACHING SIGNIFICANCE.

Duffield seeks a writ of *certiorari* in this Court in order to "fully resolve" her interrelated challenges to mandatory securities industry arbitration. Cross-Pet. at 9. At a minimum, this issue is premature for review in this Court because only one other United States Court of Appeals has so far considered the constitutionality of NYSE or NASD arbitration, and the conclusion in that circuit was consistent with the opinion below. *See Shrader v. National Ass'n of Secs. Dealers, Inc.*, 855 F. Supp. 122, 124 (E.D.N.C. 1994), *aff'd without opinion*, 54 F.3d 774 (4th Cir. 1995). Moreover, this cross-petition comes at a time when the securities industry arbitration requirement is in flux. Duffield concedes, as she must, that her constitutional challenge applies *only* to securities industry arbitration. Yet with the recent amendment to the NASD rules, it is no longer the case that mandatory arbitration of discrimination claims is, in Duffield's words, "a non-negotiable condition of employment if Ms. Duffield wished to continue working . . . for any securities firm." Cross-Pet. at 19. Clearly, in years to come, constitutional challenges to securities arbitration will become even less frequent than they already are, although mandatory arbitration will continue in that industry through individual agreements between employers and employees.

By contrast, arbitration is on the rise outside of the securities industry. *See generally* briefs *amici curiae* in support of Robertson, Stephens' petition submitted by the Chamber of Congress of the United States, the Equal Employment Advisory Council and The Employers Group. The question raised by Robertson, Stephens' petition for writ of *certiorari* — whether agreements to arbitrate Title VII and related state statutory

discrimination claims are enforceable under the Federal Arbitration Act — affects employers and employees in every sector of the economy.

As stated in Robertson, Stephens' petition and the briefs of amici curiae in support of the petition, the Ninth Circuit's decision below burdens thousands of employers with operations both inside and outside the Ninth Circuit. Contrary to the pro-arbitration policies of the Federal Arbitration Act, employers inside the Ninth Circuit are deprived of the benefit of their agreements to arbitrate. Employers and employees within the Ninth Circuit will be forced in many cases into bifurcated proceedings — arbitration of common law claims and parallel court litigation of statutory claims. Nationwide employers are in the difficult position of either excluding employees within the Ninth Circuit from arbitration or bearing the added cost and delay of arbitration *and* litigation, often in the same case. The decision below thus creates inefficiencies affecting the resolution of employment disputes nationwide. Duffield simply cannot point to any comparable exigent circumstances regarding her constitutional challenge to securities industry arbitration.

CONCLUSION

For all of the foregoing reasons, the conditional cross-petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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